

JAN 11 2008

JEANNE G. QUINATA
Clerk of Court

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9 **IN THE UNITED STATES DISTRICT COURT**
10 **TERRITORY OF GUAM**

11 UNITED STATES OF AMERICA,

12 vs.

13 IN HYUK KIM aka DOMINIC,

14 Defendant.

CRIMINAL CASE NO. CR07-00064

**DEFENDANT IN HYUK KIM'S IN LIMINE
REPLY MOTION TO EXCLUDE 404(b)
EVIDENCE**

15 The Defendant, In Hyuk Kim, by and through counsel, LUJAN AGUIGUI & PEREZ LLP
16 replies to the government's opposition to his in limine motion to exclude 404(b) evidence, as
17 follows:

18 **ARGUMENTS**

- 19 **1. The government failed to provide reasonable notice of its intent to use 404(b)
evidence at trial.**

20 Federal Rule of Evidence 404(b) requires the government to provide reasonable notice in
21 advance of trial of the general nature of the any such evidence it intends to introduce at trial. In its
22 Response 9:4-5, the government states that "Defendant was advised of these statements in an
23 April 9, 2007, letter to former counsel, FPD John Gorman." A review of said letter, a copy of
24 which is attached as Exhibit A, reveals that the government did not advise the defense that it
25 intended to introduce 404(b) evidence at trial.
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1 **2. The government failed to address the Ninth Circuit four-part test for admission of**
2 **other acts evidence.**

3 To be admissible in the Ninth Circuit, other acts evidence must satisfy four requirements:
4 (1) it must prove a material element of the offense charged; (2) the prior conduct must be similar
5 to the charged conduct; (3) proof of the prior conduct must be based upon sufficient evidence;
6 and, (4) the prior conduct must not be too remote in time. *U.S. v. Viscarra-Martinez*, 57 F.3d
7 1506, 1513 (9th Cir. 1995). The burden of proving that the evidence of prior bad acts meets these
8 requirements is on the government as the proffering party. *U.S. v. Alfonso*, 759 F.2d 728, 739 (9th
9 Cir. 1984). The government however, has not addressed this four-part test in its Response. Should
10 the government be given an opportunity to do so, the defense requests an opportunity to respond.

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12 **3. The alleged evidence has no basis in fact and is unreliable.**

13 The government has no evidence that any prior bad acts were committed by the
14 Defendant: there is no testimony, no recordings, no videotape, no prior legal proceedings, and no
15 witness accounts. The government may argue that it has the Defendant's statements as evidence
16 of the prior acts. However, those statements are unreliable as they were coerced and subject to a
17 concurrently filed motion to suppress. The statements are not corroborated by any other evidence.

18
19 **4. The "other act" evidence is not inextricably intertwined with the crime charged.**

20 The government argues that the other act evidence is not subject to 404(b) evidence
21 because it is inextricably intertwined with the crime charged. The defense disagrees. The Ninth
22 Circuit has sometimes allowed evidence to be admitted because it constitutes a part of the
23 transaction that serves as the basis for the criminal charge. *U.S. v. Vizcarra-Martinez*, 66 F.3d
24 1006, 1011 (9th Cir. 1995). In *U.S. v. Williams*, 989 F.2d 1061 (9th Cir 1993), the Ninth Circuit
25 concluded that contemporaneous sales of cocaine and crack by the Defendant were inextricably
26 intertwined with the crime with which the Defendant was charged: the sale of cocaine. In
27

1 *Williams* the Court noted “the policies underlying rule 404(b) are inapplicable when the offense
2 committed as part of a ‘single criminal episode’ become other acts simply because the Defendant
3 was indicted for less than all of his actions.” *Id.* at 1070. The *Williams* case is distinguishable. In
4 the instant case there was no contemporaneous transaction. Mr. Kim did not commit multiple
5 criminal actions as part of a single criminal episode. If the government’s evidence is to be
6 believed, which it should not be, it shows that the alleged prior other acts occurred from 2003 to
7 2006 and that the Defendant discontinued his alleged acts when he learned that an investigation
8 had been undertaken. The Defendant has not been charged for less than all of his actions; there is
9 no reliable evidence of prior actions.
10

11 The second circumstance where the Ninth Circuit has permitted other act evidence to be
12 admitted has been when it was necessary to do so in order to permit the prosecutor to offer a
13 coherent and comprehensible story regarding the commission of the crime. *U.S. v. Vizcarra-*
14 *Martinez* at 1012-1013. In the instant case the other act evidence is not required for the
15 government to present its theory of the case. The government can simply explain to the jury, if
16 this matter is permitted to reach trial, on how it initiated its investigation of the Defendants and
17 what the investigation revealed.
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19 **5. The government has waived the Federal Rule of Evidence 403 argument.**

20 The defense argued that even if the government satisfies the 404(b) four-part test, the
21 evidence should nevertheless be excluded as its probative value, if any, is substantially
22 outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or
23 by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
24 The government has not responded to this argument. Accordingly, the government has waived
25 argument on this issue and the 404(b) evidence should be excluded. Alternatively, should the
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1 government be given an opportunity to address this argument, the defense requests a reasonable
2 opportunity to respond.

3 **CONCLUSION**

4 For the reasons stated and based upon such further arguments and evidence which may be
5 presented, the Defendant respectfully requests the motion be granted.

6 Dated this 11th day of January, 2008.

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8 **LUJAN AGUIGUA & PEREZ LLP**

9
10 By: 

PETER C. PEREZ, ESQ.

Attorneys for Defendant In Hyuk Kim aka Dominic

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EXHIBIT A



U.S. Department of Justice

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AUG 13 2007

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August 9, 2007

John Gorman
Federal Public Defender
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Re: United States v. In Hyuk Kim, Cr. No. 07-00064

Dear John,

I am enclosing the discovery on this case, and a plea offer. I understand that the *Marianas Variety* published the fact of his arrest the next day, so I don't know what he could do for us.

Sincerely,

LEONARDO M. RAPADAS
United States Attorney
Districts of Guam and NMI

[Handwritten signature]
KARON V. JOHNSON
Assistant United States Attorney